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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 176

GEORGE C. REINING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 271-276) is reported at 167 F. 2d 362.

JURISDICTION

The judgment of the circuit court of appeals was entered April 20, 1948 (R. 277), and a petition for rehearing (R. 278-280) was denied May 27, 1948 (R. 281). On June 25, 1948, by order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to July 26,

1948 (R. 283), and the petition was filed on that date. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether a motion for a mistrial, based on a statement of the prosecutor to the jury allegedly calling attention to petitioner's failure to testify, was properly denied.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of Florida on each of five counts charging use of the mails to defraud, and, on a sixth count, of conspiring to do so (R. 1-26, 249-250). He was sentenced to one year's imprisonment on each count, the terms to run consecutively (R. 262-263). On appeal, his conviction was reversed as to counts 3 and 5 on the ground of insufficiency of the evidence (R. 273, 277), but was affirmed as to all other counts (R. 277).

Since petitioner does not question the sufficiency of the evidence in respect of those counts as to which his conviction was affirmed, it is unnecessary to review it here. The general nature of the scheme to defraud, however, is set forth in the opinion of the circuit court of appeals (R. 272-273).

The motion for a mistrial, the denial of which is the only alleged error relied on in the petition

for a writ of certiorari, was made under the following circumstances:

In his closing argument to the jury, the prosecuting attorney, referring to a letter bearing petitioner's signature which was mailed to one Smith, a government witness (R. 174-175), and which was the mail matter involved in the first count of the indictment (R. 8-9), said (R. 225):

> Now this letter is in Count 1. That is the one that is alleged, and you have to believe beyond a reasonable doubt; first, that there was a scheme devised by this defendant, either by himself or in connection with Boyer, and that they caused—either put or caused to be placed in the mail for transmission that letter. There is no question but that that letter went through the mail from Miami to A. C. Smith of San Antonio, Texas, and that he received it and produced it here. There is no dispute about that and no denial.

No objection was registered to this statement at the time, but after the prosecutor had completed his summation and the jury had been excused, petitioner's counsel moved for a mistrial on the ground (R. 226) that the prosecutor—

> * * * while discussing the case before the Jury, referred to the defendant * * * as having not taken the witness stand in that he * * * referred to an exhibit * * * as being an instrument signed by the defendant bearing his signature, and * * * laid the instru-

ment out on the table in front of the Jury, and glancing in the direction of the defendant, said "There is no dispute about that and no denial."

In denying the motion, the court said (R. 229-230):

> * * * The part of the argument that is excepted to which has to do with the District Attorney's remarks to the jury that there was no dispute about a certain letter and no denial —The Court observed the District Attorney at the time this part of the argument was made and recalls that it was made after both counsel for the defense had argued the case, and I did not observe any gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark here that there was no dispute and no denial. My interpretation of the remark was that he had reference to the argument of counsel. That he was answering the argument of counsel. His argument was in rebuttal of counsel for defendants; and he was dwelling upon that when he said there was no dispute about that and no denial. Therefore the Court did not interpret it to mean that the defendant hadn't testified or that the defendant himself hadn't denied it. I don't think that any juror could have so interpreted it. I don't see any other logical or reasonable interpretation of that remark except that, in answer to counsel's argument, he stated that there was no dispute

> and no denial as to this particular letter. The Court is of the opinion and finds that there has been no violation of the rules or the law with reference to directing the attention of the Jury to the fact that the defendant has not taken the witness stand. * * *

The circuit court of appeals, in discussing the contention that the denial of the motion for a mistrial was erroneous, said (R. 276):

> * * * The court said he observed the district attorney at the time, and did not see any gesture that would indicate to anyone that he was referring to the defendant as making no dispute or denial, but the court thought he was referring to the argument of defendant's counsel just concluded, and was answering that argument. The court did not understand it as referring to the defendant not having testified and did not think any juror could have so interpreted it. It seems to us that this is the clear meaning of what was said. The facts stated are indeed even now undisputed and undenied by anyone. The inference from them that the defendant mailed it, which is the only thing the defendant could in reason deny, was of course disputed, but was not included in the statement. We see no ground for a mistrial here.

ARGUMENT

Petitioner's contention (Pet. 2, 3) that the district court erred in refusing to grant his motion for a mistrial is based on the assumption that the

prosecutor, when he said, "There is no dispute about that and no denial," was commenting on petitioner's failure to take the witness stand and deny having sent the letter in question to Smith. The assumption is unfounded. The trial judge, who witnessed the incident, said that he had observed no "gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark," but that, on the contrary, the remark was in reference to the failure of petitioner's counsel to dispute the mailing of the letter in his closing argument. Certainly no one is better situated to interpret the prosecutor's remark than the trial judge, who was present when it was made and who therefore did not have to rely on the cold words of the printed record in interpreting it.

Petitioner, however, points out that his attorney, in his opening statement, had denied generally petitioner's participation in a scheme to defraud (Pet. 8), and argues from this that, in making the remark now complained of, the prosecutor must have been referring to petitioner's failure to testify. But the prosecutor was not referring to the absence of a general denial of guilty participation in the fraudulent scheme; the reference was clearly to the absence of a denial that the letter was mailed to Smith. And, as the trial judge made clear, the remark of the prosecutor was directed

not to the opening statement of petitioner's counsel, but to the latter's failure in his closing argument to deny that the letter went through the mails from Miami to Smith in San Antonio, Texas.

Petitioner (Pet. 7, 9) makes much of the fact that the circuit court of appeals, in giving its reasons for upholding the refusal to declare a mistrial, observed that "The facts stated [*i.e.*, that the letter in question, bearing petitioner's signature, was mailed to and received by government witness Smith] are indeed even now undisputed and undenied by anyone" (R. 276), and argues that this is "the most conclusive and powerfully persuasive argument of all that the United States Attorney was referring to the failure of the petitioner to take the stand" (Pet. 9). But petitioner neglects to quote the immediately succeeding remark of the circuit court of appeals, which contains the point the court was making, *viz.*, "The inference from them that the defendant mailed it, which is the only thing the defendant could in reason deny, was of course disputed, but was not included in the [prosecutor's] statement."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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